STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2002
v	No. 222668 Wayne Circuit Court
WILLIAM CALVIN HUNT, Defendant-Appellant.	LC No. 99-003391 ON REMAND

Before: Murphy, P.J., and Holbrook and Zahra

PER CURIAM.

This case is on remand from our Supreme Court for reconsideration in light of its decisions in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), and *People v Silver*, 466 Mich 386; 646 NW2d 150 (2002). We reverse.

The procedural history of this case was set forth in our previous opinion:

> Defendant was originally charged with two counts of unarmed robbery, MCL 750.530, after he and another man were observed fleeing a Farmer Jack grocery store in Dearborn. There was evidence at trial to suggest that although defendant was not seen taking anything from the store, he sprayed a clerk who was trying to lock the exit doors with a yellow substance before fleeing the store. The trial court concluded that defendant was not guilty of unarmed robbery. However, the court found defendant guilty of assault and battery [MCL 750.81] for spraying the clerk. [*People v Hunt*, unpublished opinion per curiam of the Court of Appeals, issued 7/31/2001 (Docket No. 222668), slip op at 1.]

Defendant appealed his conviction, arguing that it was improper for the trial court to have considered the lesser misdemeanor offense of assault and battery where defendant faced two counts of unarmed robbery because there was no factual relationship between the lesser and greater offense. This Court affirmed defendant's conviction, holding that the rule set forth in *People v Stephens*, 416 Mich 252, 261-264; 330 NW2d 675 (1982), requiring five conditions to be met before a trial judge can instruct a jury on a lesser misdemeanor offense where a defendant faces felony charges, did not apply to bench trials and did not prevent the trial court from considering the cognate lesser offense of assault and battery in this case. *Hunt, supra*, slip op at 2. Our Supreme Court vacated this Court's opinion and remanded for reconsideration in light of *Cornell* and *Silver*.

Whether defendant was properly convicted of a cognate lesser offense presents a question of law that we review de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). In *Cornell* and *Silver*, the Supreme Court overruled contrary case law, including *Stephens* and its progeny, and explained that the language of MCL 768.32 does not permit consideration of a cognate lesser offense. *Cornell, supra* at 354, 359; See also *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). MCL 768.32(1) provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

"The statute permits the jury to convict a defendant of a degree of '*that offense inferior to that charged* in the indictment.' " *Cornell, supra* at 354, quoting MCL 768.32(1) (emphasis in *Cornell*). Because cognate lesser offenses are not "inferior" to the greater charged offense, they may not be considered. *Cornell, supra* at 354-355. MCL 768.32(1) expressly applies to both jury trials and bench trials.

In the present case, defendant was charged with unarmed robbery, but the trial court convicted him of assault and battery. Assault and battery is a cognate lesser offense of unarmed robbery. *People v Bryant*, 80 Mich App 428, 433-434; 264 NW2d 13 (1978). Under *Cornell* and *Silver*, the trial court could not properly consider the cognate lesser offense of assault and battery.

Reversed.

/s/ William B. Murphy
/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra